80-1341

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Docket No.

IN THE

SUPREME COURT OF THE UNITED STATES

In the Matter of

CHARLES SUTTON, an attorney,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: January, 1981

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Docket No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

In the Matter of

CHARLES SUTTON, an attorney,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Charles Sutton, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit. [1]

Note 1. Reference for all purposes is respectfully made to Docket No. 80-313, Charles Sutton, Appellant v. Joint Bar Association Grievance Committee,etc., Appellee, and is incorporated herein by reference. The appeal was dismissed for want of jurisdiction and certiorari was denied. Petition for rehearing was denied January 12, 1980. Reference thereto hereinafter: Docket No. 80-313.

Questions Presented

1. Whether, in this public action, judicial, penal, adversary, quasi-criminal attorney disciplinary proceeding involving petitioner's Constitutional rights of "liberty" and "property", the charges, alleging fraud and 'conversion of escrow funds', must be proved by "clear and convincing evidence" rather than by the "preponderance of evidence" standard of proof used.

(a) Whether the use of the preponderance of evidence standard of proof violated the petitioner's Constitutional rights to Due Process and Equal Protection under the Fifth and Fourteenth Amendments of the United States Constitution.

2. Whether the recognition by the Second Circuit Court of Appeals of the state order of suspension of the peti-

tioner conflicts with the decisions of this Court in Selling v. Radford, 243 U.S. 46, Theard v. United States, 354 U.S. 278, and In re Ruffalo, 390 U.S. 544.

(a) In light that the Second Circuit Court of Appeals would not allow petitioner to present oral argument on the merits and evidentiary sufficiency of the state charges, and considered itself bound by the state court decision on the merits and on the sufficiency of the evidence, considered that the dismissal by this Court of petitioner's appeal from the state court order of suspension for want of jurisdiction and the denial of certiorari, under Docket No. 80-313, barred independent consideration and decision by the Second Circuit Court of Appeals of the issues presented.

(b) Whether petitioner was

denied Due Process under the Fifth and Fourteenth Amendments in the state proceedings by the use of the preponderance of evidence standard of proof?

(c) Whether the petitioner was denied Due Process and Equal Protection under the Fifth and Fourteenth Amendments in the state proceedings by denial of notice of the charges and opportunity to be heard in the first stage of the statutory two stage state procedure required by Rule 691.4 of the Rules of the New York Supreme Court Appellate Division Second Department, which two stage procedure is statewide by way of similar rules adopted by every other state Appellate Division?

(d) Whether New York Supreme Court Appellate Division Rule 691.4 is void and unconstitutional as applied in violation of the Due Process and Equal

Protection provisions of the Fourteenth Amendment and of the Fifth Amendment in light of the denial of the said first stage proceeding to the petitioner.

(e) Whether New York Supreme Court Appellate Division Rule 691.4(e)(5) is void and unconstitutional on its face and as applied in violation of the Due Process and Equal Protection provisions of the Fourteenth Amendment in light of the denial of the said first stage proceeding to the petitioner.

(f) Whether the petitioner was denied Due Process of Law under the Fifth and Fourteenth Amendments by conviction of the state charges as to (a) Santora, and (b) Zolondek respectively, without evidence and upon insufficient evidence?

(g) Whether the petitioner was denied a fair trial under the Fifth,

Sixth and Fourteenth Amendments in the state proceedings by denial of the right to cross-examine the adversary attorney, Korobow, on his motive, bias, and prejudice, and that he had been subjected to criticism and complaint by his own clients, Santora ,as to his handling of their matter?

(h) Whether DR9-102, New York Judiciary Law, Appendix, is void and unconstitutional as applied in violation of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments in the absence of proof of the essential elements thereof, that there was no attorney-client relation between petitioner and the contract vendees, Santora, and the contract down payment paid by the Santoras to the seller, a corporation wholly owned by petitioner who personally owned the fee

title, as a matter of state law, belonged to the seller?

(i) Whether petitioner was denied Due Process under the Fifth and Fourteenth Amendments by conviction on a charge not made in Zolondek of which petitioner had no notice and no opportunity to be heard?

Parties to the Proceedings below

The New York State Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts of the New York Supreme Court participated by invitation of the Second Circuit Court of Appeals. (See, Docket No. 80-313)

The Grievance Committee of the United States Court of Appeals for the Second Circuit was served with all documents, but filed no papers and made no appearance below.

OPINION BELOW

The United States Court of Appeals for the Second Circuit did not render any opinion.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). This is an original attorney disciplinary proceeding in the Second Circuit Court of Appeals based solely on a state order of suspension (See, Docket No. 80-313) pursuant to F.R.A.P. Rule 46(b), 28 U.S.C.A., and U.S. Court of Appeals, Second Circuit, Rule 46(f), 28 U.S.C.A. The proceeding was commenced by order dated January 11, 1980. (App. 1a) The order for review suspending petitioner of the United States Court of Appeals for the Second Circuit was entered November 12, 1980. (App. 3a) A motion for rehearing

and reconsideration and to recall the order of the Second Circuit Court of Appeals dated November 12, 1980 was filed January 13, 1981. The motion has not yet been decided.*

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution:[2]

Fifth Amendment; Sixth Amendment; Fourteenth Amendment.

* In light that no rule apparently exists as to the time for filing a petition or motion for rehearing and reconsideration in the Second Circuit Court of Appeals in this original attorney disciplinary proceeding, this petition for certiorari has been filed to avoid any problem of timeliness.

Note 2: Appendix, pp. 8a

Federal Statutes and Rules:[3]

28 U.S.C. Section 1254(1);
F.R.A.P. Rule 46(b), 28 U.S.C.A.;
U.S. Ct. of App. 2d Cir. Rule 46(f), 28 U.S.C.A.

New York Statutes and Rules:

New York Judiciary Law, Section 90(2) 4
Rules of the New York Supreme Court Appellate Division, Second Department[5]
Rule 691.1, 22A NYCRR 691.1
Rule 691.2, 22A NYCRR 691.2
Rule 691.4, 22A NYCRR 691.4

New York Judiciary Law, Appendix: Disciplinary Rules[6]
DR9-102A
DR6-101(A)(3)
DR7-101(B)(1)

Note 3: Appendix pp. 5a
Note 4: Docket No. 80-313, J.S. App. 48a-50a.
Note 5: Docket No. 80-313, J.S. App. 51a-61a.
Note 6: Docket No. 80-313, J.S. App. 62a-65a.

STATEMENT OF THE CASE

Petitioner is a 56 year old attorney admitted to practice in the State of New York in 1952 who was active in civil and criminal cases, at trial and on appeal. He was admitted to practice in the United States Court of Appeals for the Second Circuit in 1959. He was suspended from practice in the New York State courts by order of the New York Supreme Court Appellate Division, Second Department dated November 13, 1979.[7] That state court in its said order, stated that petitioner had an "unblemished record... (and) excellent character references attesting to his trustworthiness".[8]

Note 7: See, Note 1, supra; Docket No. 80-313, J.S. App. 32a.

Note 8: See Note 1, supra; Docket No. 80-313, J.S. 4, J.S. App. 19a.

Based solely on the state order of suspension, the Second Circuit Court of Appeals, in its original proceedings by order dated and entered January 11, 1980, ordered a similar suspension. Pursuant to F.R.A.P., Rule 46(b), 28 U.S.C.A., and U.S. Ct. of App. 2d Cir. Rule 46(f), 28 U.S.C.A., the petitioner timely filed on February 4, 1980 his motion to revoke the order of suspension, and effected the automatic stay thereof (App. 7a). The petitioner also duly filed the record of the state attorney disciplinary proceedings including the motions, hearing transcript, and memoranda of law filed in the State Appellate Division and New York Court of Appeals, as well as the documents on the appeal therefrom to the New York Court of Appeals and to this Court under Docket No. 80-313, viz. , the Jurisdictional Statement and

Appendix, Appellee's motion to dismiss the appeal, the Appellant's Opposition to Motion to Dismiss dated October 6, 1980, the Court's decision dated November 3, 1980 dismissing the appeal for want of jurisdiction and denying certiorari and later, the Appellant's Petition for Rehearing, and decision of this Court dated January 12, 1981 denying rehearing. Petitioner filed a supplemental motion dated August 7, 1980 for an order to revoke the Second Circuit Court of Appeals order of suspension and requesting again an order directing that a hearing be conducted as to the state charges in the event the Second Circuit Court of Appeals does not summarily revoke its order of suspension. The petitioner's motions were based upon Selling v. Radford, 243 U.S. 46 (1917); Theard v. United States, 354 U.S. 278 (1957); In

re Ruffalo, 390 U.S. 544 (1968), F.R.A.P. Rule 46(b), 28 U.S.C.A., and U.S. Ct. of App. 2d Cir., Rule 46(f), 28 U.S.C.A.

All of the issues set forth in the State proceedings,[9] and more, were set forth to the lower court to show that the state decision should not be followed, upon the principles set forth by this Court in Selling v. Radford, 243 U.S. 46, 56, Theard v. United States, 354 U.S. 278 and In re Ruffalo, 390 U.S. 544, including the Constitutional impermissibility of the use of the preponderance of the evidence standard of proof[10], the denial of Due Process and

Note 9: Docket No. 80-313, J.S. i-iii; 22-56.

Note 10: Docket No. 80-313, J.S. 41-53.

equal protection under the Fourteenth Amendment by denial to petitioner of his rights to notice of the charges and opportunity to be heard in the first stage of the New York statutory two stage attorney disciplinary proceeding[11], denial of due process under the Fourteenth Amendment by conviction of violation of DR9-102(A) and DR6-101(A)(3) without evidence[12], denial of due process under the Fourteenth Amendment by conviction of a charge not made and as to which petitioner had no notice and no opportunity to be heard[13], denial of due process under the Fourteenth Amendment by conviction of misconduct which petitioner did not commitant which was without evidence thereof, denial of petitioner's right to a fair trial, denial of petitioner's rights under the Sixth and Fourteenth Amendment to cross-examine Korobow, the attorney for the ad-

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Note 11: Docket No. 80-313, J.S. 22-41.
Note 12: Docket No. 80-313, J.S. 54-55.
Note 13: Docket No. 80-313, J.S. 53-54.

versaries, Santoras, on his motives, bias, prejudice, and self-interest in that he was criticized by his own clients for his mishandling of their case, as well as, that the penalty of three years suspension was excessive, harsh, and three times, and more, greater than the penalties imposed on other attorneys against whom, the evidence showed was objectively established or was without dispute, that they have converted money belonging to their clients for their own use.[14]

The Second Circuit Court of Appeals did not allow hearing on the charges, but only allowed only oral argument on November 12, 1980 on the petitioner's motion to revoke the order of suspension before a panel of three Judges, to wit, Judges Lumbard, Mansfield and Van Graafeiland. In the face of petitioner's arguments under Selling v.

Note 14: e.g. Matter of Donohue, ___A.D.2d____, 432 N.Y.S. 2d 498 (2d Dept. 1980) (censure); Matter of Fisher, 67 A.D. 2d 312, 313, 415 N.Y.S. 2d 252 (2d Dept. 1979) (censure); Matter of Mc Kenna, 68 A.D. 2d 473, 475, 417 N.Y.S. 2d 762 (2d Dept. 1979) (One year suspension).

Radford, supra, that the Federal Court is obliged to determine the facts for itself, the said Court barred argument of the merits by petitioner stating: "The Court: Now you're arguing the merits. That was before the Appellate Division. You're not arguing constitutional issues now". The Second Circuit Court of Appeals showed at oral argument that it considered itself bound by the decision of the state Appellate Division on the merits and also on the issue of due process, on the basis that the New York Court of Appeals had dismissed the petitioner's appeal and that this Court had dismissed the petitioner's state appeal to this Court "for want of jurisdiction", and had denied certiorari (Docket No. 80-313), to wit: "The Court: Well, you're saying you were denied due process. Did you argue before the Appellate Division that you were denied due process? Mr. Sutton: Yes, except.... The Court: And the case went to

the Supreme Court of the United States, didn't it? Mr. Sutton: Yes. The Court: And last week the Supreme Court of the United States dismissed the appeal insofar as it was dismissable and denied cert with respect to the balance. Am I correct on that. Mr. Sutton: Yes, for want of jurisdiction. May I address that point Your Honor, so that I may - - The Court: It seems to me that's basic here. Mr. Sutton: Forgive me Your Honor, may I address it. The Court: Yes". (Affidavit of Charles Sutton,sworn to January 13, 1980, pp. 23-24, Petitioner's Motion for an order to Reconsider, for a Rehearing, suggestion for en banc consideration, for a written opinion, to recall the order of Second Circuit Court of Appeals dated November 12, 1980, and other relief filed January 13, 1981; that motion is pending undecided.) The Second Circuit Court of Appeals clearly showed at oral argument that it considered and decided the issue presented by petition-

er, namely, that the use of the preponderance of evidence standard of proof was unpermissable under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that the use of such a low standard conflicted with the decision of this Court and with the decisions of other circuit Courts of Appeals to wit: "Mr. Sutton: May I address the issue of the standard of proof? The Court: Yes. We've read the papers and we're well aware of your attack on the preponderance of evidence rule. Mr. Sutton: Very well, Your Honor".[15]

The statement of facts as to Santora and Zolondek set forth in Docket No. 80-313, J.S. 10-21 is respectfully incorporated herewith.

The petitioner has consistently asserted his innocence of any misconduct.

Note 15: Petitioner's motion for reconsideration, rehearing, and other relief to the Second Circuit Court of Appeals included the foregoing quotations from the oral argument.

The petitioner was found guilty of "converting escrow funds" on the basis of the conclusion of the state referee that the petitioner "procured the release of the escrow funds...without the consent or knowledge of the buyers attorney" and because of that conclusion as to the buyers attorneys alleged lack of consent or knowledge, the referee concluded that petitioner "converted the same" (sic) after 'procuring the release of the escrow funds'. The referee's conclusion was devoid of reasons or reasoning. The issue in the case was credibility between the petitioner and the buyer's attorney, Korobow. (Docket No. 80-313, J.S. App. 13a; 15.) The record shows that Korobow, the Santora attorney, knowingly filed in court a false verified answer and counterclaim in the civil action for damages by petitioner against the Santoras for breach of contract (T501-502). Korobow pleaded allegations claiming mutual mistake of fact

that the parties intended that the seller, not the purchaser, should apply for a mortgage for the purchasers (T490-492, 494). The contract between the seller, Plover Builders, Inc., which corporation was wholly owned by the petitioner, who personally owned the fee title to the two family real property being sold, expressly required the buyers, (the Santoras) to apply for and obtain their own mortgage commitment and mortgage at their own cost and expense. (T167-169, 182-183, 499-502). The contract was drafted by Korobow, the buyers' attorney in his own hand, on his own forms, and typed in his own office (T167-169, 182-183, 499-500).

Korobow testified that he was an experienced real estate attorney who had handled many real estate transactions and that he had used the same contract forms as in the Santora contract many times (T182-183, 499-501). In the face of the

explicit provisions of Korobow's own mortgage rider contract provisions requiring the purchasers to obtain their own mortgage at their own expense, Korobow testified: "Q. Mr. Korobow, you say you were familiar with the forms of this contract, is that right? A. Yes, sir. Q. And you also knew under the terms of this contract, and more particularly under the rider of the contract, it was the obligation of the purchaser to obtain a mortgage or apply for a mortgage? A. That's not so" (T208). "Q. Is it your contention that it was (Mr. Sutton's obligation to obtain a mortgage commitment for the purchaser? A. It says so right in the written form..." (T184). On the other hand, Korobow testified that he knew that the contract required the purchasers to obtain the mortgage, to wit: "Q. And that contract says specifically, in your handwriting, that the purchasers were to obtain the mortgage for the property? A. Well, it's com-

mon knowledge that the purchasers obtain it. Q. Will you answer that question? A. The answer is yes, I prepared it. Q. And that contract says the purchasers are to - - A. Every contract - - Q. That contract? A. Every contract says it". (T499-500). Faced on cross-examination with those facts, Korobow testified that allegations of his verified answer counterclaim prepared by him and under his supervision and approved by him (T438-439) were "not a fact" (T501-502): "Q. So that there was no mutual mistake and no mistake at all? A. That is a pleading. That's a pleading, it is not a fact". Korobow further revealed his own character and thinking when he tried to justify his false pleading, to wit: "Every attorney that puts in an ad damnum clause (on) questions of damages is a liar.... (T492).

The Korobow verified answer and counterclaim also averred that the Santoras

were ready, willing and able to close title to the contract and had "tendered" the balance of the purchase price. On cross examination those verified allegations were also shown to be knowingly false, to wit: "Q...Did they tender to Mr. Sutton the full $24,000 less the deposit. A. They were never asked to tender" (T447). Korobow, in fact, knew that the Santoras never tendered the balance of the purchase price because the Santoras had told him that they did not have the money (T460-461) to wit: "Q. Would this be a fair statement, that the Santoras never said they had $24,000 at the time, that's in September of 1971? A. That's a fair statement...Q. And, of course, you knew that, isn't that so? A. I didn't have access to their bank books, but they told me they didn't" (T460-461).

The application of the proper standard of proof is a matter of Constitutional Due Process and is critical to the factfinding in this case.

REASONS FOR GRANTING THE WRIT

Point I

The Question Presented as to the Standard of Proof involves a conflict between the Decision of the Second Circuit of Appeals and the Decision of this Court and the Decisions of Seven Courts of Appeals

The State Court used the "fair preponderance of evidence standard of proof in that attorney disciplinary proceeding, to wit: "It should be remembered that this is a civil proceeding and the petitioner need only prove the charges by a fair preponderance of the evidence. Feola v. N.Y.S. Bar Association, 37 App. Div.(2) 789" (Docket No. 80-313, J.S. App. 9a-19a).

Petitioner argued in the Second Circuit Court of Appeals that in this original attorney disciplinary proceeding, the charges against the petitioner, which included allegations of fraud and conversion of escrow funds[16], must be proved by "clear and

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Note 16: See Note 1; Docket No. 80-313, J.S. 3a-16a.

convincing" evidence. The court below directly acknowledged the issue at oral argument on November 12, 1980, to wit: "The Court: We've read the papers and we're aware of your attack on the preponderance of evidence rule".

The Second Circuit Court of Appeals ruled against the petitioner and thus applied the preponderance of evidence standard of proof in this attorney disciplinary proceeding (App.3a-4a).

The holding of the court below is squarely in conflict with the decision of this Court in Ex Parte Wall,107 U.S.265,275,288, and at 388(Fields,J.,dissent). It is squarely in conflict with the decisions of seven (7) Courts of Appeals namely: Charlton v. F.T.C., 543 F.2d 903, 907-909 (D.C. Cir. 1976), and explained by Collins v. S.E.C., 562 F.2d 820, 825 (D.C. Cir. 1977); In re Ryder, 263 F. Supp. 360, affirmed 381 F.2d 713 (4th Cir. 1967); In re Dawson, 609 F.2d

1139, 1140 (5th Cir. 1980); In re Spicer, 126 F.2d 288, 289 (6th Cir. 1942); In re Fisher, 179 F.2d 361 (7th Cir.), cert. denied sub nom Kerner v. Fisher, 340 U.S. 825 (1950); Hertz v. United States, 18 F. 2d 52, 54 (8th Cir. 1927); and In re Sawyer, 260 F.2d 189, 199-200; Ibid, 260 F.2d at 211 (concurring); Ibid, 260 F.2d at 219-220 (dissent), reversed on grounds of insufficiency of evidence, 360 U.S. 622 (1959).[17]

The conflict between the decision of the court below and the decision of this Court in Ex Parte Wall, supra, and the decisions of the Courts of Appeals for the District of Columbia, the Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits is clear, fundamental and undisputable.

Note 17: Mr. Justice Frankfurter, in dissent, quoted the Hawaii Supreme Court that "the charges have been sustained by convincing proof, by credible evidence of more than a mere preponderance...."

The court below has refused to follow the decision of this Court in Ex Parte Wall, supra, and the decisions of the other Courts of Appeals, supra. The conflict cannot be reconciled.

The Second Circuit Court of Appeals has failed to follow its own decisions which require the "clear and convincing" evidence standard of proof in purely civil actions alleging fraud between private parties involving monetary issues. Infra, Point IA. The court below arbitrarily applied the lowest civil, private action, money issue, negligence type case standard of proof to this case, which is a public, quasi-criminal, punitive, adversary, judicial proceeding involving petitioner's most fundamental Constitutional rights of "liberty" and "property". Infra, pp. 29-31.

As shown in Docket No. 80-313, J.S. App. 74a-84a, the American Bar Association Code of Professional Responsibility, the

penal code for attorneys, has been adopted in every jurisdiction in the United States, almost verbatim, for the most part, and in particular, DR9-102.

There is a clear need for uniformity in the standard of proof by which charges and allegations against attorneys founded on the Disciplinary Rules are proved in attorney disciplinary proceedings. It is fundamentally unfair that upon the same or similar allegations on charges of violations of the same or similar disciplinary rules, one attorney in a "preponderance of evidence" jurisdiction would be found guilty and another attorney in a "clear and convincing" evidence jurisdiction would be found not guilty. The Preamble and Preliminary Statement of the ABA Model Code of Professional Responsibility, 7 Martindale-Hubbell Law Directory (1980 ed.) pp. 1M-2M, and of the New York Code of Professional Responsibility, 29 Judiciary Law,

Appendix, p. 356, state: "The Disciplinary Rules should be uniformly applied to all lawyers regardless of the nature of their professional activities."

Only this Court has the power to resolve the conflicts and vindicate its own decision in Ex Parte Wall, supra. The resolution of the question presented is crucial to the orderly, fair, and just enforcement of the Disciplinary Rules in all of the federal and state jurisdictions throughout the United States, involving, as they do, the attorney's fundamental Constitutional rights of "liberty" and "property" in the true Constitutional sense. It is critically important to the petitioner's Due Process and Equal Protection rights. In most instances, allegations of fraud, and other quasi-criminal wrongdoing are alleged in attorney disciplinary proceedings. Friendly, Some Kind of Hearing, 123 U.Pa. L.R. 1267, 1295-1297 (1975). On that basis alone, the "clear and convincing" evidence

standard of proof must be applied. Infra, Point IA.

The importance of the federal question is shown also in light of the grant of certiorari by this Court in Steadman v. S.E.C., Docket No. 79-1266 on April 28, 1980, which was argued on December 3, 1980, the grant of review in Doe v. Delaware, Docket No. 79-5932, which includes the issue of constitutionality of the standard of proof of preponderance of evidence in a child custody-parent fitness case, and in the light of the determination by this Court in various contexts, of the issue of the permissible standard of proof in Vance v. Terrazas, 444 U.S. 252 (1980), Addington v. Texas, 441 U.S. 418 (1979), (Due Process), In re Winship, 397 U.S. 358 (1970), (Due Process), Mullaney v. Wilbur, 421 U.S 684 (1975) (Due Process), Woodby v. INS, 385 U.S. 276 (1967), Schneiderman v. United States, 320 U.S. 118, 125 (1943); Chaunt v. United States, 364 U.S.

350 (1960); Rosenbloom v. Metromedia, 403 U.S. 29 (1971), Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); The Barbed Wire Patent Case, 143 U.S. 275, 284 (1892); United States v. American Bell Tel. Co., 167 U.S. 224 (1897); The Maxwell Land Grant Case, 121 U.S. 325, 380 (1887); and The Atlantic Delaine Co. v. James, 94 U.S. 207 (1876).

This Court in Ex Parte Wall, 107 U.S. 265, 275, 288 (1882) held that the charges in an attorney disciplinary proceeding must be "clearly proved", Ibid, 107 U.S. at 288,

> "Undoubtedly the power is one that ought to be exercised with great caution; and ought never to be exercised except in clear cases affecting the standing and character of the party as an attorney."

Mr. Justice Field, in his dissent, Ibid, 107 U.S. at 318, stated

> "Surely, the tremendous power of inflicting such a punishment should never be permitted to be exercised, unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession."

The language of this Court in Ex Parte Wall is demonstrated to be a thoughtful and deliberate expression of the required standard of proof in light of the Court's similar language in an earlier civil case, between private parties involving allegations of fraud in an action to cancel a written contract, namely, The Atlantic Delaine Co. v. James, 94 U.S. 207 (1876), which was quoted in the later case of The Maxwell Land Grant Case, 121 U.S. 325, 380 (1887), as well as in the later case of United States v. American Bell Telephone Co., 167 U.S. 224, 241 (1896), and in the other cases cited in the American Bell Telephone Co. case, including Colorado Coal and Ice Co. v. United States, 123 U.S. 307. The Court, in The Maxwell Land Grant Case, 121 U.S. 325, 380 (1887) stated:

> "In the case of the Atlantic Delaine Co. v. James, 94 U.S. 207, Mr. Justice Strong, in delivering the opinion of the court, said, in regard to the

> power of the courts of equity to cancel private contracts between individuals: 'Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and impeded by them...."

In the Maxwell Land Grant Case, 121 U.S. 325, 381 (1887), the Court specifically rejected the preponderance of evidence standard of proof as 'leaving the issue in doubt', in favor of the "clear, unequivocal, and convincing" evidence standard of proof, to wit: "We take the general doctrine to be, that when in a court of equity, it is proposed to set aside, annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which it is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of the

evidence which leaves the issue in doubt."

The Court, in In re Winship, 397 U.S. 358, 367-368 (1970), by Mr. Justice Brennan, noted that the preponderance of evidence standard of proof is inherently defective on the critical truth finding function of the standard of proof, to minimize the risk of error. Also, Addington v. Texas, 441 U.S. 418, 99 S.Ct.1804,1809(1979).

Four Courts of Appeals cited Ex Parte Wall, 107 U.S. 265 (1882) as authority for the requirement of the "clear and convincing" evidence standard of proof, to wit: District of Columbia: Charlton v. F.T.C., 543 F.2d 903, 906(D.C.Cir.1976); Sixth Circuit: In re Spicer, 126 F.2d 288, 289 (6th Cir. 1942); Eighth Circuit: Hertz v. United States, 260 F.2d 52, 54 (8th Cir. 1927); and Ninth Circuit: In re Sawyer, 260 F.2d 189, 219-220 (9th Cir. 1958), (dissent), reversed on other grounds, 340 U.S. 622 (1959).

Of forty-four states reporting cases on this issue, thirty-four states require a standard of proof higher than "preponderance of the evidence", and generally, "clear and convincing" evidence. (Docket No. 80-313, J.S. App. 86a-97a).

The interests at stake for the petitioner are his fundamental Constitutional rights of "liberty" and "property", his right to practice law, to earn a livelihood for his family and himself, his right to maintain his good name, honor, and reputation and standing among his peers, the courts, his clients, his community, and the public, and his right in that connection not to be deprived thereof by stigmatization and destruction of all that is dear to life. Greene v. McElroy, 360 U.S. 474 (1959); Goss v. Lopez, 419 U.S. 565 (1975); Ex Parte Wall, 107 U.S. 265, 289 (1882); In re Ruffalo, 390 U.S. 544 (1968); Board of Education v. Roth, 408 U.S. 564, 571-572,

also, note 2 (1972); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Spevak v. Klein, 385 U.S. 511 (1967); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Bridges v. Wixon, 326 U.S. 135, 152-157 (1945); Truax v. Raich, 239 U.S. 33, 41 (1915). These interests of the petitioner are of "transcending value", Speiser v. Randall, 357 U.S. 513, 525-526 (1959); they are "as dear as life itself". People ex rel. Chicago Bar Assoc. v. Bither, 334 Ill. 264, 165 N.E. 798, 804 (1929). "The issue is vital to the party assailed. An adverse decision dooms him always to disgrace and often to want and poverty". Matter of Eldridge, 82 N.Y. 161, 167 (1880).

> "The profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise."

Ex Parte Burr, 22 U.S. 529 (1824). Mr. Justice Brennan, in In re Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 1385 (1959) acknowledged that the right to practice law is "price-

less", to wit: "It is insisted that petitioner's right to practice law cannot be reduced to monetary terms, because it is 'priceless', and so it is, in a manner of speaking...."

In Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 1808 (1979) the Court held that the preponderance of evidence standard of proof is the lowest standard of proof, and is applicable in those civil cases between private parties involving mere money issues such as negligence cases, to wit: "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion". This attorney disciplinary proceeding is not a civil case, between private parties, involving a mere

monetary dispute. It is "of a public nature and quasi-criminal" Matter of An Attorney, 83 N.Y. 164, 165 (1880); "it is of a highly penal character", In re Post, 7 N.Y.S. 438 (Gen.T. 2d Dept. 1889); "These are adversary proceedings of a quasi-criminal nature" In re Ruffalo, 390 U.S. 544, 550-551 (1968); Erdmann v. Stevens, 458 F.2d 1205, 1209-1210 (2nd Cir.) cert. denied 409 U.S. 889 (1972); Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427, 432 (2nd Cir. 1975): It "involves much more than private litigation between individual litigants." In Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 1809 (1979), the Court held that "In cases involving individual rights whether criminal or civil, 'the standard of proof (at a minimum) reflects the value society places on individual liberty." "Liberty" in the Constitutional sense, is not merely physical confinement against his will. Bolling v. Sharpe, 347 U.S. 497, 499-500

(1954); See also cases cited in Docket No. 80-313, J.S. 25-26. Where "liberty" is implicated, the standard of proof is a matter of Due Process under the Constitution. Addington v. Texas, supra, 99 S.Ct. at 1808-1809, 1813; Vance v. Terrazas, 444 U.S. 252 , 100 S.Ct. 540, 548; ibid, 100 S.Ct. at 551 (Marshall, J., dissent) and at 552 (Stevens, J. dissent). While the Court in Vance v. Terrazas, supra, held that "ex-patriation proceedings are civil in nature and do not threaten a loss of liberty", in this case the proceedings threatened a loss of "liberty" and "property", in the Constitutional sense.

It is settled that an attorney in disciplinary proceedings is entitled to due process of law. In re Ruffalo, 390 U.S. 544, 550 (1968).

Point IA

The Decision of the Second Circuit Court of Appeals conflicts with decisions of this Court and of other Courts of Appeals and with its own decisions on the Standard of Proof on charges alleging fraud

The decision of the court below in applying the "preponderance of evidence" standard of proof in this case which charges allegations of fraud and "conversion of escrow funds",[19] allegations which are of both quasi-criminal and criminal wrongdoing[20], directly conflicts with the decisions of this Court in The Atlantic Delaine Co. v. James, 94 U.S. 207 (1876); The Maxwell Land Grant Case, 121 U.S. 325, 381, (1887); United States v. American Bell Telephone Co., 167 U.S. 224, 241 (1896), and the other cases cited therein, see, also, Addington v. Texas, 441 U.S. 418 (1979) and directly conflicts with the decisions of ten circuit Courts of Appeals, including the Second Circuit itself which expressly require the "clear and convincing" evidence standard of proof in civil cases

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Note 19: Docket No. 80-313, J.S. App. 2a-6a.

Note 20: People v. Keefe, 50 N.Y. 2d 149 (1980).

alleging fraud. Significantly, the court below in Barr Rubber Products Co. v. Sun Rubber Co., 425 F.2d 1114, 1120, 1121 (2d Cir. 1970), cited decisions in this Court and in the First, Third, Sixth, Eighth and Tenth Circuits on that point, to wit:

> "Generally, a civil plaintiff must prove his affirmative case by no more than a preponderance of the evidence. Ordinarily this is true even where a criminal act is charged as part of a civil case ....(Cases cited). We assume from the lower court's silence that it applied this normal 'preponderance of the evidence' test.
>
> However, there is ample authority of long standing that to substantiate charges of fraud or of undue influence, at least in actions seeking the recovery of monies paid or the rescission or cancellation of contracts, a litigant must present 'clear and convincing proof'. United States v. American Bell Telephone Co., 167 U.S. 224, 241, 17 S.Ct. 809, 42 L.Ed. 144 (1897); Lalone v. United States, 164 U.S. 255, 257, 17 S.Ct. 74, 41 L.Ed 425 (1896); United States v. Maxwell Land-Grant Co., 121 U.S. 325, 381, 7 S. Ct. 1015, 30 L.Ed. 949 (1887); Atlantic Delaine Co. v. James, 94 U.S. 207, 214, 24 L.Ed. 112 (1876); McDonnell v. General News Bureau, Inc., 93 F.2d 898, 901 (3 Cir. 1937);

New York Life Ins. Co. v. Kwetkauskas, 63 F. 2d 890 (3rd Cir.), cert. denied 289 U.S. 762, 53 S. Ct. 793, 77 L. Ed. 1505 (1933); Bowen v. B. F. Goodrich Co., 36 F. 2d 306, 308 (6 Cir. 1929); United States v. Hays, 35 F. 2d 948 (10 Cir. 1929); United States v. Paiz, 293 F. 755 (8 Cir. 1923); And see, Troeder v. Lorsch, 150 Fed. 710, 714 (1 Cir. 1906), where it is stated: '(W)hen a person is charged with all the elements which constitute a heinous crime, although it be only on a civil issue, it shocks the judicial mind to refuse to give him the benefit of the usual presumption of innocence unless the adverse proofs are so far satisfactory as to be convincing'. A civil tax penalty for fraud must also be established by clear and convincing proof. Rogers v. C.I.R., 111 F. 2d 987, 989 (6 Cir. 1940); Bukowski v. United States, 136 F. Supp. 91 (S.D. Texas 1955); Owens v. United States, 98 F. Supp. 621, 626 (W.D. Ark. 1951), aff'd. 197 F. 2d 450 (8 Cir. 1952). Logic and reason demand that no lower standard of proof be applied in assessing a charge of perjury and especially so when a finding that material evidence has been falsified permits the allowance of an adversary's attorney's fees not otherwise recoverable. We hold, therefore, that the district court committed procedural error by applying the wrong standard of proof in adjudicating the charge that perjury has been committed."

The conflict is clear and irreconcilable. The Second Circuit Court of Appeals has failed even to follow its own decisions on this point.

In Barr, supra, the Second Circuit noted that the conscience of the court would be shocked to apply a preponderance of evidence standard of proof in that case where the charge of "perjury" "permits the allowance of an adversary attorney's fees not otherwise recoverable", and required "no lower standard of proof be applied ... (than) clear and convincing evidence ". Barr, supra, 425 F. 2d at 1120-1121. In this case, the consequences to the petitioner are catastrophic, to his whole life, depriving him of his right to dignity as a human being, his reason for living, his honor, his reputation, his right to practice his profession, to earn a livelihood, and to support his family, the very essence of

Constitutional "liberty" and "property". The decision below directly conflicts with the decisions also of the Fifth Circuit: Merrill-Stevens Dry Dock Co. v. M/V "Laessez-Faire", 421 F. 2d 430, 433 (5th Cir. 1970); Seventh Circuit: Merit Ins. Co. v. Colao, 603 F. 2d 654, cert den. 100 S.Ct. 1318 (1979); Ninth Circuit: Fruit Ind. Research Foundation v. National Cash Register Co., 406 F. 2d 546, 548-549 (9th Cir. 1969); Tenth Circuit: Central National Bank of Cleveland Ohio v. King, 573 F. 2d 669, 673 (10th Cir. 1978). It is the settled law in New York in both state and federal courts in civil cases between private parties involving allegations of fraud that the required standard of proof is "clear and convincing evidence". Simcuski v. Saeli, 44 N.Y. 2d 442, 452-453 (1978); Ajax Hardware Mfg Co. v. Industrial Plants Corp., 569 F. 2d 181, 186 (2nd Cir. 1977); Barr Rubber Products Co. v. Sun Rubber Co.,

425 F. 2d 1114, 1120-1121 (2nd Cir. 1970); McDonnell v. American Leduc Petroleum Ltd., 456 F. 2d 1170, 1176 (2nd Cir. 1972); Pittsburgh Coke & Chem. Co. v. Bollo, 421 F. Supp. 908, 924 (E.D.N.Y. 1976); Schmeider v. Hall, 421 F. Supp. 1208, 1216 (S.D.N.Y. 1976), aff'd 545 F. 2d 768 (2nd Cir.) cert. denied 97 S.Ct. 1601 (1977).

The petitioner has been denied due process and Equal Protection under the Fifth and Fourteenth Amendments by the arbitrary reduction of the standard of proof to preponderance of evidence in this case.

Point II

The decision by the Second Circuit Court of Appeals squarely conflicts with the decisions of this Court in Selling v. Radford, Theard v. United States, and In re Ruffalo, and with decisions of every other Court of Appeals.

The petitioner squarely presented the issue in the Second Circuit Court of Appeals that this Court's decisions in Selling v. Radford, 246 U.S. 46 (1917); Theard v. United

States, 354 U.S. 278 (1957), and In re Ruffalo, 390 U.S. 544 (1968), required the lower court "to determine for itself the facts of the attorney's conduct and whether that conduct has been so grievous as to require disbarment", In re Ruffalo, supra, whether the state proceedings 'was wanting in due process', whether there was "an infirmity of proof as to the facts found to have established the want of fair private and professional character", and whether "some other grave reason existed", which would obligate the federal court not to follow the state court order or suspension. Selling v. Radford, supra; Theard v. United States, supra. The lower court showed that it considered the State order of suspension as binding upon it as to the merits, the denial of due process issues, and the punishment imposed, and would not allow petitioner even to argue the merits at the time of oral argument before the lower court.

The decision of the Second Circuit Court of Appeals in this case directly, fundamentally, and irreconcilably, conflicts with the decisions of this Court in Selling v. Radford, 243 U.S. 46 (1917); Theard v. United States, 354 U.S. 278 (1957); and In re Ruffalo, 390 U.S. 544 (1968); and In re Isserman, 345 U.S. 286, 78 S.Ct. 676, 677 (1953), and directly conflicts with the decisions of every Court of Appeals, the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuits, as well as the decisions of the Second Circuit itself, to wit: In re MacNeil, 266 F. 2d 167 (1st Cir. 1959); In re Troy, 505 F. 2d 746 (1st Cir. 1974); Matter of Abrams, 521 F. 2d 1094 (3rd Cir. 1975); Wrighten v. United States, 550 F. 2d 990 (4th Cir. 1977); In re Wilkes, 494 F. 2d 472 (5th Cir. 1974); In re Collis, 556 F. 2d 804 (6th Cir. 1977); In re Ginger, 372 F. 2d 620 (6th Cir. 1967); In re Ming, 469 F. 2d 1352 (7th Cir. 1952): In re Echeles,

430 F. 2d 347 (7th Cir. 1970); In re Noell, 93 F. 2d 5 (8th Cir. 1937); In re Sawyer, 260 F. 2d 189 (9th Cir.)reversed (based on this rule), 360 U.S. 622, 628 (1959); In re Bithoney, 486 F. 2d 319 (10th Cir. 1973); and In re Isserman, 271 F. 2d 784 (2nd Cir. 1959), by its refusal to decide the issues for itself. The decision of the Second Circuit Court of Appeals directly challenges and undermines the independence and jurisdiction of the federal courts to decide for itself whether attorneys admitted to practice law in its own courts shall be excluded or not excluded, upon standards and principles set by this Court, and not by the various state courts, and to control and manage its own courts and the attorney which the federal courts admits to practice there.

Point II A

The Second Circuit Court of Appeals denied petitioner a hearing in violation of F.R.A.P. Rule 46(f), 28 U.S.C.A., and the Due Process and Equal Protection Provisions of the Fifth Amendment.

F.R.A.P. Rule 46(f), 28 U.S.C.A., provides that an attorney is entitled to a hearing upon demand therefor. The petitioner duly demanded a hearing. The court below denied that request (App.3a), and granted him only oral argument as on a motion.

Oral argument is not a hearing, Morgan v. United States, 298 U.S. 468, 480 (1936); Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 ; Wilner v. Comm. on Character and Fitness, 373 U.S. 96, 103 (1963); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 165 (1951) (Frankfuster, J., concurring); Windsor v. McVeigh, 93 U.S. 274, 277 (1876); In re Ming, 469 F. 2d 1352 (7th Cir. 1972).

The decision of the lower court denied petitioner Due Process and Equal Protection under the Fifth Amendment by failing to follow the said rules of court. United States v. Nixon, 418 U.S. 683, 694-696 (1974); Accardi

v. Shaughnessy, 347 U.S. 260, 268 (1954); Service v. Dulles, 354 U.S. 363 (1959); Vitarelli v. Seaton, 359 U.S. 535 (1959); Yellin v. United States, 374 U.S. 109 (1963); Sneaker Circus, Inc. v. Carter, 566 F. 2d 396, 402 (2nd Cir. 1977); United States v. Leahy, 434 F. 2d 7, 8, 10 (1st Cir. 1970).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE PROVDA, ESQ.
Attorney for Petitioner
Office & P.O. Address
299 Broadway
New York, N.Y. 10007
Tel. (212)227-4785

Dated: January, 1981

Order of Suspension dated
January 11, 1980

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of January, one thousand nine hundred and eighty.

Present: HON. IRVING R. KAUFMAN, Chief Judge
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
HON. JOHN O. NEWMAN
HON. AMALYA L. KEARSE

Circuit Judges.

IN THE MATTER OF	:	C/A Ref. No. 80-8008
	:	
CHARLES SUTTON	:	Order of Suspension
AN ATTORNEY	:	Pursuant to Local Rule 46(f)(1)

A certified copy of an order dated November 13, 1979 of the Appellate Division, Supreme Court of the State of New York, Second Judicial Department suspending from

the practice of law for a period of three years, commencing December 15, 1979, Charles Sutton, who was admitted to practice as an attorney before this court on October 14, 1958, having been filed, in this court,

IT IS ORDERED, pursuant to Rule 46(f)(1) of the rules of this court supplementing the Federal Rules of Appellate Procedure, that Charles Sutton be and he hereby is suspended from the practice of law before this court upon such terms and conditions as set forth in the order of the Appellate Division, Supreme Court of the State of New York, Second Judicial Department, dated November 13, 1979, and until further order of this court, and that this order shall become effective 24 days after the date of service upon said attorney unless sooner modified or stayed.

A. DANIEL FUSARO,
Clerk

Order on Appeal dated
November 12, 1980

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of November, one thousand nine hundred and eighty.

IN RE:

80-8008

CHARLES SUTTON

AN ATTORNEY

It is hereby ordered that the motion made herein by Charles Sutton, pro se petitioner, dated August 7, 1980 to vacate the order of this court dated January 11, 1980 suspending him from the practice of law and in the alternative, for a de novo hearing on the merits pursuant to Rule 46(b) Federal Rules of Appellate Procedure be and it hereby is denied.

It is further ordered that petitioner's request for a written decision be and it hereby is denied on the ground that there is a sufficient record already available.

A. DANIEL FUSARO, Clerk

by:
Arthur Heller, Deputy Clerk

* *

BEFORE: HON. J. EDWARD LUMBARD

HON. WALTER R. MANSFILED

HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges

United States Statutes and Rules

28 U.S.C. Section 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree."

F.R.A.P. Rule 46(b), 28 U.S.C.A.

"(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested,

or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order."

U.S. Ct. of App. 2d Cir. Rule 46(f), 28 U.S.C.A.:

"(f) Suspension or disbarment. Suspension or disbarment shall be governed by F.R.A.P. Rule 46.

(1) In all cases in which an order disbarring an attorney or suspending him from practice (whether or not on consent) has been entered in any other court of record, federal or state, and a certified copy thereof has been filed in this court, the clerk shall enter an order for the court, to become effective twenty-four days after the date of service upon the attorney unless sooner modified or stayed, disbarring the attorney or suspending him from practice in this court upon terms and conditions comparable to those set forth by the other court of record. Immediately following entry, a copy of such order shall be served upon respondent by mail at his last known address. A copy of

the order shall also be mailed to the Committee on Admissions and Grievances of the Court of Appeals to be established under subsection (h) hereof (hereafter "Committee").

(2) Within twenty days from the date of service of this court's order, a motion may be filed in this court either by such attorney or the Committee for a modification or revocation of the order of this court. Any such motion shall set forth specifically the facts and principles relied on by applicant as showing cause why a different disposition should be ordered by this court. The timely filing of such a motion will stay the effectiveness of this court's order until further order of this court.

(3) A motion to modify or revoke an order that has become effective under par. (1) will not be entertained unless good cause is shown for failure to file a motion timely under par. (2).

(4) The court in any matter disputed under pars. (2) or (3) may refer the matter to a special master to be appointed by the court for hearing and report.

(5) The foregoing paragraphs of (f) shall apply to any attorney who resigns from the bar of any other court of record, federal or state, while under investigation into allegations of misconduct on his or her part. Upon resigning under such conditions the attorney shall promptly inform the clerk of this court of such resignation.

United States Constitution:

Fifth Amendment: "No person shall ... be deprived of life, liberty, or property, without due process of law ... ."

Seventh Amendment: "In all criminal trials, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him ... ."

Fourteenth Amendment: "... Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."